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No. 71-1202

In the Supreme Court of the United States

OCTOBER TERM, 1971

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL-CIO LOCAL NO. 130, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In the initial unfair labor practice proceeding, the Board found that the Union had committed various unfair labor practices, including causing or attempting to cause Perfection Painting and Dry Wall, Inc. to discharge Robert E. Turner, a non-member of the Union, from a job in Houston, Texas, so that greater work opportunities would be available for Union members (Pet. App. 26, 29). The Board's

order—issued on April 3, 1968—required the Union, *inter alia*, to make Turner "whole for any loss of pay he may have suffered" by reason of its discriminatory conduct (Pet. App. 31).

On April 7, 1970, the Regional Director issued and served on the parties a Backpay Specification and Notice of Hearing (Pet. App. 35). After filing its answer to the Backpay Specification, the Union filed a series of motions with the Board seeking to reopen the record in the initial proceeding for the introduction of additional evidence and to stay the backpay hearing (Pet. App. 35-36). The evidence the Union sought to introduce was a contract between Perfection Painting and Local No. 823 of the Painters Union, which contained a clause that required Perfection—when working outside the Albuquerque, New Mexico, area—to employ 75 percent of its painters from the area in which the work was being performed. The contract also established a grievance procedure. The Union claimed that, since Turner did not follow the contract grievance procedure, he was estopped from receiving any protection under the National Labor Relations Act. (R. 41-49.)[1] The Board denied the Union's motions (R. 49-50, 53).[2]

2. In the subsequent backpay hearing, the Union introduced into evidence an affidavit (R. 268-271) of

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[1] "R." refers to the appendix in the court below.

[2] One of the Board's rulings is not contained in the appendix: On May 26, 1970, the Board, by telegram, denied "as lacking merit" the Union's motions to reopen the record, for summary judgment, and to stay the backpay hearing.

Paul E. Robertson, who had acted as job superintendent during the work in Houston, for the purpose of showing that Turner's earnings on the Houston job, had he not been unlawfully discharged, would have been less than the amount in the backpay specification (R. 244-247). The Trial Examiner, noting that the Union neither presented Robertson as a witness nor explained why he was unavailable to testify, concluded that the affidavit was without probative value (R. 66). He recommended that Turner be awarded backpay of $12,867.36, plus interest (R. 68).

The Union, although excepting to the Trial Examiner's recommendation, did not contest his ruling on the Robertson affidavit; on the contrary, it asserted that Robertson's testimony was "unnecessary" (R. 73). However, the Union subsequently moved the Board to reopen the hearing to take the testimony or deposition of Mr. and Mrs. Robertson and "possibly one or two other witnesses," on the ground that such evidence, which was newly discovered, "will prove intrinsic and extrinsic misrepresentation and/or misconduct of the adverse party" (R. 54). The Board denied the motion, and ordered the Union to pay the backpay recommended by the Examiner (Pet. App. 36, n. 2, 37). The court of appeals summarily enforced the Board's orders (Pet. App. 17).

3. The only issue raised by the petition is whether the Board and the court of appeals abused their discretion in refusing to reopen the record in this case to permit the Union to introduce the contract between Perfection and Local No. 823, and evidence

of alleged "fraud" by Turner (Pet. 12-13). This issue, which turns on the particular facts of the case, does not warrant review by this Court. In any event, the Board and the court of appeals were reasonable in declining to reopen the record.

a) Petitioner sought to introduce the contract between Perfection and Local No. 823 for the purpose of showing that it contained a clause which required Perfection to employ 75 percent of its painters from the area in which the work was being performed, and that Turner was discharged in conformity with this clause and not because of his non-membership in the Union. Although the Union had knowledge of this contract at the initial unfair labor practice hearing (R. 102), it did not bring it to the Board's attention until 2½ years later; and, then, the Union merely contended that a Board remedy was barred because of Turner's failure to exhaust the grievance procedure of the contract (*supra*, p. 2). In these circumstances, the Board and the court of appeals were justified in refusing to reopen the record to consider the Union's additional, belated contract defense. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104; *National Labor Relations Board* v. *Victor Otlans Roofing Co.*, 445 F. 2d 299, 300 (C.A. 9).

Moreover, the contract is not material, for the evidence warrants the Board's finding that the Union secured Turner's discharge not because area residents were out of work, but because Turner was not a

member of the Union.[3] The Union never mentioned the Local No. 823 contract when carrying its complaints about Turner to Perfection, and, in its correspondence with Perfection, the Union never demanded that 75 percent of Perfection's work force be made up of Houston residents (R. 303, 306, 311, 312, 313).

b) Petitioner sought to introduce the testimony of Robertson on the ground that his affidavit alleges (see R. 270) that Turner perpetrated the incident in Houston in order to exact money from the Union. But when the Union presented that affidavit to the Examiner, it merely contended that it showed that the Board's backpay computation was excessive. Although the Union thereafter moved the Board to reopen the record to take the testimony of Robertson and others, it made no reference to the portion of the affidavit now relied on, and did not otherwise particularize the nature of the misconduct it hoped to establish. (*supra*, p. 3.) Moreover, the Union did not mention Robertson's affidavit or Turner's alleged misconduct in its brief or reply brief in the court of appeals. In these circumstances, the Board and the court of appeals were also justified in refusing to reopen the record to consider the Union's belated

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[3] *Painters District Council No. 3, Brotherhood of Painters*, 147 NLRB 79, on which petitioner relies, is distinguishable. There, the Board simply held that a contract clause giving preference in hiring to local residents was not unlawful on its face, since it did not turn on union membership considerations. Such a clause cannot be used to immunize union action which does in fact turn on those considerations.

"misconduct" allegation. See *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 569-570.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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